The Fiduciary Rule: After the Fall

By **Lewis G. Feldman**

A 2015 report by the White House Council of Economic Advisers found that biased advice drained $17 billion a year from retirement accounts. The Federal Department of Labor proposed the Fiduciary Rule in 2016 to ensure that every financial advisor serves in a fiduciary capacity to its clients regarding retirement investments. The rule sought to bring transparency to investors about fees charged by their brokers, upfront commissions deducted from their investments and actual net returns on the securities they purchase. As of June 21, 2018, the U.S. 5th Circuit Court of Appeals officially vacated the rule, effectively killing it.

As Jack Bogel of Vanguard stated, “Investing is the one business in the world where you don’t get what you pay for, you get what you don’t pay for.” The DOL’s introduction of the Fiduciary Rule arose from a lack of clarity on the part of many investors as to what they were paying for in a securities transaction. One recent poll indicated that almost half (46 percent) of baby boomers believed that they paid no fees at all on their retirement accounts, while another 19 percent thought that they spent less than 0.5 percent, according to a survey commissioned by Rebalance IRA. In fact, upfront broker commissions and origination fees can range as high as 10 to 12 percent, according to a report in *InvestmentNews*, and annual asset management fees can approach 3.86 percent, according to a survey commissioned by Rebalance IRA. This misunderstanding of pricing displays a deficiency in investor knowledge regarding compensation and risk.

The DOL version of the Fiduciary Rule seems unlikely to be resurrected in its current form. However, the transparency cat is out of the bag, and today’s investor wants greater alignment of interests with management when it comes to fees and returns on investment, as noted in reports published in *MarketWatch* and *Harvard Law*.

Thus, a fiduciary standard of care may become the zeitgeist of the market due to a combination of forces. Technological innovation, state-proposed legislation and enforcement actions by FINRA and the SEC continue to erode the opaqueness of investing. Media attention on the Madoff scandal and the ARCS REIT scandal raised market awareness of the meaning of a fiduciary relationship. With an ever-increasing library of online resources available to investors, the individual investor is likewise increasingly aware of the need and ability to diligence deductions, deals and dealers with data, speed and accuracy—and they want more of each before making a decision. In the words of Austin Powers’ nemesis, Dr. Evil, “I’m the boss. Need the info.”

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With registered investment advisors already held to a fiduciary standard, the significant backlash against the Rule continues to hail from commission-based advising groups. But that may not be the smartest approach in the long run. Vanguard’s Bogle said in a *New York Times* op-ed last year, “the fiduciary rule may fade away, but the fiduciary principle is eternal. The arc of investing is long, but it bends toward fiduciary duty.”

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Lewis Feldman is President of KBS Direct, a Newport Beach, Calif.-based firm that empowers accredited investors and registered investment advisors to invest directly in professionally managed institutional-quality real estate portfolios similar to KBS’s institutional investors and partners. Over the past 35 years, Feldman has helped raise and deploy more than $100 billion in debt and equity for housing, infrastructure and technology companies.

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